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No. 531 Misc.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

GEORGE JOHNSON,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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A

OPINIONS BELOW

The opinions in the court of appeals below have been reported at 238 F. 2d 565. The opinion of the district court has not been reported.

B

GOVERNMENT'S CONCESSIONS

The Government with commendable candor concedes that petitioner should have been permitted with the assistance of counsel to present to the court of appeals a sufficient analysis of proceedings in the district court—possibly with

the aid of the transcript of such proceedings—to enable the court of appeals to determine whether the trial judge erred in withholding his certificate of good faith under 28 U. S. C. 1915(a) (Gov. Br. 7, 9). The Government thus in effect admits error in the proceedings below in that petitioner (a) was not represented by counsel in the district court or in the court of appeals at any stage of the proceedings in which he sought to establish his right to appeal *in forma pauperis,* and (b) was precluded from obtaining a copy of the transcript or its equivalent by which he would be able to show to the court of appeals that the trial judge erroneously issued a certificate of bad faith. With this we agree.

C

GOVERNMENT'S PROPOSED REMEDY

We respectfully disagree, however, with the Government's proposed method of correcting the errors below by requesting this Court to deny the petition for certiorari "at this time" (Gov. Br. 9). We submit that the Government's suggested corn-plaster remedy for patching up this cancerous condition in the administration of federal criminal justice should be rejected and that this Court should review this case *at this time* for these reasons:

(1) The record in the instant case is fully adequate, clear and precise to enable this Court to decide *now* the fundamental questions presented by the petition. These questions involve essentially whether the doctrine of *Griffin* v. *Illinois,* 351 U. S. 12, is to be applied to appeals by indigent defendants in the federal courts.

(2) The Government's contention that the record does not disclose any meritorious grounds upon which petitioner should be allowed to appeal *in forma pauperis,* begs the

very questions presented for determination. Denied the assistance of counsel and access to the transcript or its equivalent, petitioner of course cannot show to the appellate court errors which would merit reversal. If petitioner had been accorded these rights, the questions presented by the petition would not have arisen.

(3) The Government's suggestion that "the Court deny the petition as of this time without prejudice to its renewal after counsel shall have aided petitioner in determining whether he has a basis for appeal and, if he deems it appropriate, has resubmitted the motion to the court below" (Gov. Br. 9), will settle nothing. On the contrary, it will result in an unnecessary, protracted and wholly abortive proceeding. The way out suggested by the Government should be rejected for these reasons:

(a) As much as petitioner's assigned counsel appreciates the Government's generous suggestion that the scope of his assignment be expanded to embrace representing petitioner in the lower courts, counsel believes that the Court of Appeals for the Second Circuit, in limiting his assignment to "prosecute an application for a writ of certiorari" (R. 25), did so advisedly. After all, the court of appeals had squarely before it the question of whether to assign counsel to represent petitioner in connection with matters in the lower courts relating to his appeal. Over the protest of Judge Frank's dissenting opinion, it declined to do so. In assigning counsel to represent petitioner in seeking a writ of certiorari, however, the court of appeals obviously recognized the importance of the questions presented by its decision—questions that only this Court can settle.

(b) The Government's proposal that petitioner's assigned counsel, with the decision of the court of

appeals below standing as the law, assist petitioner in resubmitting his motion to the court below, clearly would be doomed to failure before the effort were begun. In the first place, the assigned counsel who represented petitioner during his trial is not available.* Secondly, in view of the trial judge's position (Gov. Br. App. 11) that he "adequately and properly instructed [the jury] as to the law" and that "the appeal is frivolous, lacking in merit, and not taken in good faith" it would hardly be realistic to suppose that petitioner's assigned counsel could expect much help from the trial judge in obtaining an equivalent of the transcript with which to attack his finding. Thirdly, in view of the Government's position in the form of an affidavit by the Chief Assistant United States Attorney (R. 3, 4) opposing petitioner's application in the court of appeals for leave to appeal *in forma pauperis*, aid from Government counsel in pre-

*The Government places much emphasis upon the possibility that the court-appointed lawyer who represented petitioner in the trial court up to the time he was sentenced (petitioner was not represented by counsel at any time thereafter, i. e. at no time in connection with his applications to the district court and to the court of appeals for leave to proceed *in forma pauperis* [R. Group 11; R. 1, 2; Gov. Br. App. 11; Pet. App. 21]) should aid petitioner in making a specific attack upon the trial judge's certificate of bad faith (Gov. Br. 7-9). The fact is that petitioner's court-appointed trial counsel, for reasons of his own and which we are not in a position to question, has declined further to participate in the case. Diligent efforts on our part to communicate with him have been in vain. This is an illustration of one of the difficulties inherent in the present system of assigning defense counsel to indigent persons in criminal cases in the federal courts—a system characterized by Attorney General Brownell as operating on a "catch-as-catch-can basis" in his recent communication to Congress proposing a bill to provide for public defenders in the federal courts to "give real meaning to the Sixth Amendment". N. Y. Times, February 12, 1957, p. 18. The operation, or, as in the instant case, the breakdown in the operation, of the "catch-as-catch-can" system of assigning counsel to indigent defendants in criminal cases in the federal courts, certainly should not deter this Court from issuing a writ of certiorari to review such fundamental questions in the administration of federal criminal justice as are presented by the petition in the instant case.

paring an attack upon the trial judge's certificate of bad faith would be most unlikely. Fourthly, the Government even now (Gov. Br. 7) questions the necessity or propriety of granting petitioner or the court of appeals access to the trial transcript—which under all the circumstances here disclosed is the only adequate means of enabling petitioner to establish his right to appellate review. Finally, with the decision of the court of appeals below as the law of this circuit, any attempted preparation of a revised motion by petitioner based upon some sort of an equivalent of the transcript as suggested by Judge Frank (which the Government suggests but the court of appeals has not sanctioned) would, aside from the practical difficulties noted above, be a completely wasted effort; without the transcript, the court of appeals would be in no better position to rule on the same question it has now squarely decided. Necessarily it would consider itself bound by its earlier decision.* We would then be back to this Court after much needlessly wasted time and effort.

(c) As reflected by the action of the court of appeals below in assigning counsel to file this petition for certiorari, we submit that these questions are of sufficient importance in the administration of criminal justice throughout the federal courts to warrant the granting of this petition at this time. The dilemma confronting all federal courts by precisely the situation with respect to appeals by indigent defendants as is presented by this petition, cries out for prompt solution. Avoidance of the problem by the patchwork type of remedy suggested by the Government will serve only to postpone the deci-

*The Court of Appeals for the Second Circuit, on November 9, 1956, the day upon which it decided the instant case, applied similar principles in deciding *United States* v. *Farley*, 238 F. 2d 575, and *United States* v. *Branch*, 238 F. 2d 577.

sion which inevitably this Court must render. Delay will result in continued deprivation of vital constitutional rights.

CONCLUSION

The petition for a writ of certiorari should be granted *at this time.*

Dated: New York, N. Y.
February 14, 1957

Respectfully submitted,
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